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In The

# Supreme Court of the United States

October Term, 1992

DONALD L. HELLING, CAROL E. PLOYHAR, JOHN V. IGNACIO, RONALD J. ANGELONE, and CHARLES HORN,

*Petitioners,*

vs.

WILLIAM MCKINNEY,

*Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

## BRIEF AMICI CURIAE OF THE STATES OF HAWAII, ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, FLORIDA, GEORGIA, IDAHO, ILLINOIS, INDIANA, KANSAS, KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS, MISSISSIPPI, MISSOURI, MONTANA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA, WEST VIRGINIA, WISCONSIN, AND WYOMING, THE DISTRICT OF COLUMBIA, THE COMMONWEALTH OF PUERTO RICO, AND THE TERRITORIES OF AMERICAN SAMOA, GUAM, AND THE VIRGIN ISLANDS IN SUPPORT OF PETITIONERS

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## INTEREST OF AMICI CURIAE

This Court has recognized that "[p]rison administrators [] should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their

judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). The amici States and other governmental units thus have a significant interest in seeing that their authority to manage and operate their prison and jail facilities in the most efficient manner consistent with legitimate security concerns not be unduly hampered by court-imposed orders requiring them to either ban smoking in prison or segregate prisoners according to their smoking or non-smoking tastes. Serious security problems could arise under either scenario, as a complete ban may disturb many smoking prisoners, making them more prone to violence, while attempting to segregate inmates according to smoking status could require ignoring important security concerns in assigning prisoners to cells or larger cellblocks.

Furthermore, the amici have a very significant interest in reducing the immense costs of building and operating prisons and jails within their States. The decision below, if allowed to stand, would likely lead to even greater drains on governmental treasuries as segregating prisoners according to their smoking preferences would require either new prison facilities or extensive renovations. A complete ban on smoking would require more medical personnel to treat addicted smokers suffering withdrawal symptoms and/or more prison guards and other staff to deal with the likely increase in prison unrest.

## SUMMARY OF ARGUMENT

1. The Ninth Circuit's judgment on remand, fairly stated, simply disobeyed the mandate of this Court in *Helling v. McKinney*, 112 S. Ct. 291 (1991), which directed



the Court of Appeals to give "further consideration" to this case "in light of *Wilson v. Seiter*, 111 S. Ct. 2321 (1992)." In granting a directed verdict, the Magistrate found "[t]here was no evidence presented of personal involvement by any of the Defendants," nor "any indication that any of the Defendants intentionally chose to inflict harm upon the Plaintiff." Pet. App. D-8. These rulings, not seriously challenged by Plaintiff or the Court of Appeals, mandated affirmance under the test announced in *Seiter*, namely, whether Defendants were "deliberately indifferent" to the known risks of Environmental Tobacco Smoke ("ETS") at the Nevada prisons in general, or in McKinney's case in particular. Showing improper intent was Plaintiff's burden, and Plaintiff failed in his burden of proof. Rather than remanding to the District Court for a new trial, the District Court's directed verdict should have been upheld. *Cf. Whitley v. Albers*, 475 U.S. 312 (1986) (upholding directed verdict on Eighth Amendment claim). *See generally Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (on the standards under Fed. R. Civ. P. 50 in general).

2. Involuntary exposure to ETS, either in general, or in the facts of McKinney's case, does not constitute an Eighth Amendment violation, irrespective of Petitioners' knowledge of the relevant scientific literature dealing with ETS risks. As the Tenth Circuit has observed, prisoners who are involuntarily exposed to passive smoke suffer "no adverse physical symptoms . . . different from those suffered by everyone in society." *Clemmons v. Bohannon*, 956 F.2d 1523, 1527 (10th Cir. 1992) (en banc). "[D]ebate persists about how severe the effects of secondary smoke may be," *Steading v. Thompson*, 941 F.2d 498 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1206 (1992), and

even the Surgeon General's reports are – *at the level of analysis required for an Eighth Amendment claim* – wholly inconclusive of whether exposure to ETS, either in general, or in McKinney's case, constitutes punishment that is indisputably "cruel and unusual under contemporary standards." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). Nevada was simply not required on the facts here to honor McKinney's desire for a new cellmate.

## ARGUMENT

**I. The Ninth Circuit Not only Erred, but Disobeyed the Mandate, in Refusing to Affirm the Judgment in Favor of Petitioners Based Upon the Requirement of "Deliberate Indifference," as Defined in *Wilson v. Seiter*, 111 S. Ct. 2321 (1991).**

Upon granting the Nevada prison officials' prior petition for certiorari, this Court summarily vacated the previous judgment of the Ninth Circuit, and remanded "for further consideration in light of *Wilson v. Seiter*, 501 U.S. ___ (1991)." *See Helling v. McKinney*, 112 S. Ct. 291 (1991). This mandate indicates that *Seiter* was "sufficiently analogous, and perhaps, decisive, to compel a reexamination of the case." *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964) (per curiam). The mandate therefore "contemplated that the [court of appeals] would consider, whether, as a matter of federal law, [the court's directive for a new trial] could stand in light of [*Seiter*]." *Yates v. Aiken*, 484 U.S. 211, 215 (1988). The Ninth Circuit's decision below simply "did not decide this question," *id.*, and the proper disposition on this writ is a reversal with



instructions to the Ninth Circuit to affirm the trial court judgment.

*Wilson v. Seiter*, 111 S. Ct. 2321 (1991), established that adverse prison conditions that "involve the serious deprivation" that could constitute "cruel and unusual punishment," as defined in *Rhodes v. Chapman*, 452 U.S. 337 (1981), must be inflicted by the relevant official with a requisite "state of mind" before that official may be called upon to remedy the condition under the compulsion of the Eighth Amendment. That "state of mind" is "deliberate indifference," *Seiter*, 111 S. Ct. at 2326-27, and it was this "state of mind" test that the Court of Appeals was required to apply to the record before it on the remand which this Court directed in its summary disposition in No. 91-969.

Instead, the Ninth Circuit simply noted that *Seiter* adds "a subjective component," and remanded, *despite* the fact that the Magistrate had "directed a verdict on the issue of defendants' deliberate indifference to McKinney's serious existing medical symptoms." *McKinney v. Anderson*, 959 F.2d 853, 854 (9th Cir. 1992). The Ninth Circuit justified its approach on the basis that "indifference to current medical problems is distinct from indifference to the problem of involuntary, long term exposure to unreasonable levels of ETS." *Id.* Even assuming this is true, however, the panel was simply unresponsive to the mandate and to *Seiter* in general, in that McKinney had already made his record in the District Court on this issue, and that record was (and remains) wanting as a matter of law. The Magistrate ruling on the motion for directed verdict found that McKinney had fully failed in carrying his burden of showing that "prison officials have

been deliberately indifferent to a threat against the inmate," by "intentionally expos[ing] him to a known risk or harm [that was] actually intended to harm him." Pet. App. D-6. As the District Court found, "[t]here was no evidence presented of personal involvement by any of the Defendants, nor . . . was there any indication that any of the Defendants intentionally chose to inflict harm upon the Plaintiff." *Id.* at D-10.

These findings were not controverted by the Ninth Circuit under the relevant standard, nor could they be. A motion for a directed verdict, like a motion for summary judgment, *must* be granted unless the finder of fact "could reasonably find *either* that the plaintiff proved his case by the quality and quantity of evidence required by the existing law *or* that he did not." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). When, as here, there is "no factual basis" for even a potential conclusion that Petitioners were "deliberately indifferent" to any known risks from ETS, the court of appeals ought to have affirmed rather than remanded for further proceedings below. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). This case was at trial, and Plaintiff was required to bear "the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 110 S. Ct. 2130, 2136 (1992). Respondent utterly failed in this regard, and the verdict should stand.

That this is true can be seen by the "manner and degree of evidence" that might well have met Plaintiff's burden. Assuming, *arguendo*, that constant exposure to ETS emanated by the combustion of five packs of cigarettes per day in a six-foot by eight-foot room could meet



the objective requirement for an Eighth Amendment violation, *cf.* 924 F.2d at 1507, it would at the least be necessary that the specific defendants in this case know, for a fact, that McKinney would involuntarily spend all his time in his cell, that McKinney's cellmate in fact customarily would smoke five packs of cigarettes per day, and that nothing McKinney could do by way of moral suasion could prevent the smoking. Beyond this, however, McKinney would also have to show that each specific Defendant sought to be enjoined here in fact knew of the precise risks that could make ETS exposure of this nature "cruel and unusual" in any objective sense. In fact, as the Tenth Circuit ruled in its *en banc* determination in *Clemmons v. Bohannon*, 956 F.2d 1523 (10th Cir. 1992):

> . . . If plaintiff had shown or even alleged that defendants forced him to live with others who smoked and that they did so *intentionally*, knowing the smoke would have serious medical consequences for *him*, a different result might obtain.
>
> . . . Clemmons was required to present facts that would allow a reasonable fact finder to conclude that the defendants knew of the dangers of ETS and deliberately exposed him to it.

956 F.2d at 1528 (emphasis supplied).

No such proof, however, was supplied to the District Court, nor, for that matter, has Respondent ever suggested that there even exists such proof. It was for this reason, no doubt, that this Court vacated and remanded to the court of appeals for what ought to have been a straightforward disposition under *Seiter*. This Court does not customarily send cases on "brief round trip[s] to the

courts below," *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 447 (1988), and it was error for the Ninth Circuit to prolong the proceedings. The judgment on remand should be reversed, and the directed verdict of the District Court rejecting Respondent's Eighth Amendment claims reinstated pursuant to *Wilson v. Seiter, supra*.

## II. The Mere Possibility that Forced Exposure to Levels of Secondhand Smoke Will Lead to Cancer or other Disease at Some Unspecified Time in the Future Does Not Satisfy the Objective Component of a Cruel and Unusual Punishment Claim.

Even assuming that the Nevada prison officials harbored a "deliberate indifference" to the risks of ETS, either in general, or in McKinney's specific situation, McKinney's claim does not satisfy the "objective component" of an Eighth Amendment violation. *See Hudson v. McMillian*, 112 S. Ct. 995 (1992). The Ninth Circuit's original judgment, as reinstated by its ruling on remand, unduly expands the Eighth Amendment beyond the scope of this Court's precedents, and should therefore be reversed.

The starting point for discussion in this case must be the undeniable fact that there are many environmental factors which produce latent risks of injury or disease, yet this Court has never held that the Eighth Amendment requires these factors to be eliminated or reduced. Indeed, affirming the judgment of the Ninth Circuit in this case will open a Pandora's box, out of which will



spring endless numbers of complaints over environmental, nutritional, or programmatic conditions at the Nation's prisons, each masking as a claim for violation of the Eighth Amendment's limited ban on "cruel and unusual punishment."

The range of analogous claims is vast. In the South and Hawaii, inmates may well complain that mandated exercise programs expose prisoners to too much ultraviolet radiation, risking melanoma or other skin disorders. In the North, prisoners might complain that shoveling snow on a winter work detail too likely risks back injury, or heart attack. Everywhere, prison diets that feature too much cholesterol, too few poly-unsaturated fats, not enough vegetables, or some other deficiency which medical science confirms is linked to cancer, heart disease, or stroke, would come under scrutiny in federal court under the guise of claims challenging conditions as breaching the Eighth Amendment. Indeed, the severe depressive effects of prison itself, which undoubtedly flow from the loss of companionship, contact with family, church, and the community as a whole, arguably affect longevity, and threaten latent risk of disease or death.

While the amici States concur with the longstanding view of the Surgeon General that an inmate's *own* smoking habit is a danger to his or her *own* physical health, the evidence of risk associated with ETS does not lead to the conclusion that States must take action to set up "no smoking" areas in their prisons.

Indeed, the Surgeon General's 1986 Report, *The Health Consequences of Involuntary Smoking* (U.S. Dep't of Health & Human Services 1986), is, for purposes of Eighth Amendment standards, sufficiently equivocal that those government entities that run prisons and jails should not even face the sort of litigation contemplated by the panel below. For example, while the Surgeon General concludes that "[i]nvoluntary smoking is a cause of disease, including lung cancer, in healthy nonsmokers," *id.* at vii, the Report also states that "[r]isk associated with involuntary smoking exposure is uncertain," and "[i]mportant questions related to (ETS) exposure require further research," as "[m]ore accurate estimates for the assessment of exposure in the home, workplace, and other environments are needed." *Id.* at 101. In fact, "little is known about the magnitude of the (ETS) exposures that occur in different segments of the U.S. population," and "[a] better understanding of the exposures that are actually occurring in the United States, and of past exposures, would be needed to accurately assess the risk for the U.S. population." *Id.* at 96-97. In short, as the report states, "[t]here are no studies of acute respiratory illness experience in adults exposed to environmental cigarette smoke." *Id.* at 60.

As to specific disease-risks associated with ETS, the Surgeon General's Report was notably cautious in its findings. According to the Report, "[t]he physiological and clinical significance of the small changes in pulmonary function found in some studies of adults remains to be determined," as "[t]he small magnitude of effect implies that a previously healthy individual would not



develop chronic lung disease solely on the basis of involuntary tobacco smoke exposure in adult life." *Id.* at 62. Likewise, "[s]tudies of large numbers of individuals with measurement of the relevant physiologic exposure parameters will be necessary to adequately address the effects of environmental tobacco smoke exposure on asthmatics." *Id.* at 65. Indeed, the Surgeon General wrote that "[t]here has been relatively little systematic evaluation of policies restricting smoking in public places or at the workplace." *Id.* at 16.

Against this backdrop, the Ninth Circuit was quite wrong to impose the Surgeon General's recommendations as a matter of Eighth Amendment mandate – a mandate which not even Congress can change despite the manifest policy considerations inherent in no-smoking policies, or other forms of regulation of the tobacco industry. *See Cippolone v. Liggett Group, Inc.*, 60 U.S.L.W. 4703 (U.S. June 24, 1992) (narrowly applying Congress' preemptive statements in the cigarette advertising field); *id.* at 4710 (Blackmun, J., joined by Kennedy, J., and Souter, J.) (describing Court's opinion on state tort claims seeking recovery for injury to smokers as a "compromise" between pro- and anti-smoking positions). Contrary to the Ninth Circuit's judgment, States should be free to set their own course for their prisons with respect to smoking. Indeed, as the Ninth Circuit observed, "[n]ationwide, the proportion of smokers in prisons is 90 percent." 924 F.2d at 1507 n.21. In the face of this large majority, and the unrest flat bans on smoking produce in the prison environment, States may well choose to balance the competing harms by allowing smoking in their prisons, either in all places, or in some, or at particular times. The State and

federal Courts should not be permitted,at least not under this Court's Eighth Amendment jurisprudence, to mandate no-smoking cellblocks, or otherwise interfere with that balancing process.

The aberrant nature of the Ninth Circuit's judgment is confirmed by analysis of the federal Government's own regulatory efforts with regard to ETS. Thus, while the Surgeon General has drawn from what evidence exists the conclusion that exposure to ETS increases health risks, the Surgeon General has no authority to regulate smoking other than by moral suasion. The one federal agency that does possess that power is the Occupational Safety and Health Administration (OSHA) in the United States Department of Labor. Not only has OSHA not yet adopted the Surgeon General's conclusions, in a recent regulatory action the agency declined to issue a temporary standard limiting ETS exposure in the workplace, finding that ETS did not constitute a "grave danger" of the sort that must be present to justify such an extraordinary standard. The Court of Appeals for the District of Columbia Circuit upheld OSHA's determination in an unpublished opinion. *Action on Smoking and Health v. Occupational Safety and Health Administration*, 1991 U.S. App. LEXIS 10487 (D.C. Cir. May 10, 1991). Only within the past year has OSHA even issued a Request for Information on Occupational Exposure to Indoor Air Pollutants, 56 Fed. Reg. 47892 (Sept. 20, 1991), which seeks information on all indoor pollutants, including ETS. In this request, OSHA estimates that of the approximately 70% of Americans who do not smoke, up to 77% of them, roughly 75 million Americans, are regularly exposed to ETS at work. *See* 56 Fed. Reg. at 47892-93. It is for this



reason that OSHA is only studying the "major issues which the Agency needs to consider in determining whether regulatory action is appropriate and feasible to control health problems related to indoor air quality." *Id.* Such statements simply cannot be squared with the Ninth Circuit's conclusion that ETS in prisons and jails across the United States is "cruel and unusual punishment."

The Ninth Circuit's reliance on no-smoking bans or limits in public places for its conclusion that "unwanted exposure to ETS may amount to a violation of 'society's evolving standards of decency,' " is logically misplaced, and untenable in light of this Court's Eighth Amendment jurisprudence. To be sure there may be many facets of public life, which, if unregulated, are unpleasant – or sufficiently risky – to enough of the population that regulation, under the police power, is undertaken. But the mere fact of police power regulation of smoking *outside* of prisons does not mean that "society's evolving standards of decency" mandate analogous regulation *inside* the prison. In fact, taken seriously, the Ninth Circuit's logic, if extended to its ultimate conclusion, would make any public refusal to mandate for itself the harsh features of prison life significant proof that prison life itself is "cruel and unusual." This, of course, is not the law. For while a prison environment free of involuntary confinement with chain-smoking cellmates might "reflect an aspiration toward an ideal environment for long-term confinement," the Constitution does not mandate comfortable prisons." *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981). *Compare Wilson v. Seiter*, 111 S. Ct. at 2327 (upholding dismissal of claims attacking inadequate air conditioning, housing

with mentally-ill inmates, and overcrowding). This logic requires reversal, and reinstatement of the verdict.

As both the Seventh and Tenth Circuits have recently, and unequivocally, held, whatever else the Eighth Amendment might proscribe, it does not reach the risk-enhancement present by environmental tobacco smoke. Prisoners who are involuntarily exposed to passive smoke, in this sense, suffer "no adverse physical symptoms . . . different from those suffered by everyone in society." *Clemmons v. Bohannon*, 956 F.2d 1523, 1527 (10th Cir. 1992) (en banc). As the Seventh Circuit has agreed, "debate persists about how severe the effects of secondary smoke may be." *Steading v. Thompson*, 941 F.2d 498, 500 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1206 (1992). This fact, alone, negates any Eighth Amendments claim, for the Cruel and Unusual Punishments Clause responds to conditions that are indisputably "cruel and unusual under contemporary standards." *Rhodes*, 452 U.S. at 347. Involuntary exposure to ETS, at least on the facts presented here, simply does not meet this test.

Nevada, of course, may well be obligated to treat prisoners who develop illnesses, whatever their source, including those that may result from secondary smoke inhalation, just as it must treat heart disease, stroke, arthritis, cancer, or a number of other illnesses that may be triggered by prison life. Indeed, in this case, McKinney voiced complaints, and the District Court found that the Nevada officials were not deliberately indifferent to his medical needs. *See* Pet. App. D-7-D10. But Nevada is not obligated to eliminate risks – such as exposure to secondary smoke – which, while undoubtedly unpleasant, and, even, perhaps "harsh," *see* 452 U.S. at 347, do not violate contemporary standards defining



*punishment* that is cruel and unusual. The Ninth Circuit's decision remanding this case is error, and should be reversed.

## CONCLUSION

For the reasons stated above and by the Petitioners, the judgment of the Court of Appeals should be reversed, and the cause remanded with instructions to reinstate the directed verdict for Defendants on Respondent's Eighth Amendment Claim.

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